

**NEGOTIATED RULEMAKING UNDER
PUBLIC LAW 101-648**

**Interim Status Report to the Congress
Administrative Conference of the United States**

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On November 29, 1990, President Bush signed Public Law 101-648, the Negotiated Rulemaking Act of 1990 (now codified at 5 U.S.C. §§561-570). Passed by Congress with bipartisan support, the Act was intended to establish a statutory framework for the conduct of negotiated rulemaking (sometimes referred to as "regulatory negotiation" or simply "reg-neg") and to encourage federal agencies to make appropriate use of this innovative procedure for consensus-based rulemaking. This interim status report is submitted to Congress in partial compliance with 5 U.S.C. §569(d).

The Negotiated Rulemaking Act expires on November 29, 1996, and the Administrative Conference plans to submit a comprehensive report on negotiated rulemaking activities under the statute early in 1996. The report will include extensive comments on the specific provisions of the Negotiated Rulemaking Act, in time for detailed congressional consideration prior to the Act's sunset date. Because nearly one-third of all federal negotiated rulemakings have been conducted by the Environmental Protection Agency (EPA), the Conference, in 1994, commissioned a study of EPA's experience. The results of that study will also be included in next year's report. In addition, the Conference will evaluate the results of President Clinton's September 1993 memorandum directing agencies to select at least one rulemaking proceeding for which reg-neg will be used. We note that, within the last week, the President reaffirmed his encouragement of agency use of reg-neg as a regulatory reform technique by instructing agencies to "submit to the White House a list of pending rulemakings that can be converted into negotiated rulemakings to strengthen public-private partnerships." (White House press release, February 21, 1995)

The Reg-Neg Process

The essential idea of negotiated rulemaking is to provide an opportunity, in appropriate instances, for representatives of potentially affected interests to work cooperatively, with each other and with the agency, to try to reach consensus on a proposed rule or regulation. The process is designed to foster that cooperation by providing incentives and making use of a facilitator, whose role is to assist the agency and the other parties in their negotiations. Participants in the process include individuals and organizations, or their representatives, who would have to live with the consequences of the proposed rule. Depending on the subject matter of the rule, committee members might represent the views of regulated companies, small businesses, state and local governments, and consumer or environmental organizations.

The reg-neg process supplements the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §553. An agency's proposed rule, even if it is based on negotiated rulemaking, must still be published in the Federal Register and the public must have an opportunity to comment, in accordance with that Act. In actual practice, agencies indicate that reg-neg has led to fewer, less adversarial comments being filed.

The original goal of negotiated rulemaking was to avoid costly litigation. Agency experience suggests that negotiated rulemaking has been successful in reducing the amount of litigation challenging agency regulations, even when complete consensus is not achieved through the negotiations. Over a 12-year period, only three lawsuits have been filed involving rules based on negotiated rulemaking, and in none of the litigation has there been any challenge to the reg-neg process.¹ Beyond that apparent success, however, there appears to be anecdotal evidence that reg-neg has resulted in “better” rules, in the sense that the agencies are making rulemaking decisions based on more complete and accurate information that has been subjected to careful review by the negotiating committees. The negotiation process helps ensure that regulatory alternatives, as well as their real-world consequences, are factored into the decisionmaking process. Negotiated rulemaking thus identifies and helps avoid inefficient or costly regulatory choices by the agency, and potentially reduces the cost of implementation to both the government and the private sector.

Who Has Used Reg-Neg?

Since the Administrative Conference’s original 1982 recommendation to agencies on how and when to use negotiated rulemaking, the entire universe of federal agency reg-neg proceedings (including ones now under way) is approximately 45, sponsored by more than a dozen agencies. More than one-third of these have been conducted by the Environmental Protection Agency, which is the only agency that has created an office specifically to assist other parts of the agency in identifying candidates for reg-neg or other consensus-building processes, and assisting in the conduct of those proceedings.

We note that the Federal Acquisition Streamlining Act of 1994, Public Law 103-355, includes a provision (section 5093) stating the sense of Congress that, in prescribing acquisition regulations, the Federal Acquisition Regulatory Council should consider using negotiated rulemaking procedures in appropriate circumstances.

Appendix A contains a list of all agencies that have undertaken negotiated rulemaking proceedings. Reg-negs begun since passage of the Act are identified. The list also identifies all reg-negs undertaken pursuant to requirements of specific substantive statutes.

The Administrative Conference’s Reg-Neg Program

The Administrative Conference, under 5 U.S.C. §569, is responsible for assisting other agencies to carry out the purposes of the Negotiated Rulemaking Act. To meet this responsibility:

- Conference staff members have advised numerous individual agencies on a broad range of issues involved with reg-neg. This service includes presenting individually-designed seminars for specific agencies, meetings with agency staff, commenting on written documents, and answering specific questions on the applicable law and best practices.
- As part of a continuing series of seminars and roundtables on various topics in alternative dispute resolution, the Conference conducted a seminar in October 1991, attended by more than 200 people and keynoted by Senator Carl Levin, sponsor of the Negotiated Rulemaking Act.

¹ The three lawsuits have been directed at EPA rules. Two of these, which the agency based on the negotiations in the absence of a consensus, were upheld by the D.C. Circuit [*Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988); and *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990)]. The third lawsuit, which is currently pending before the D.C. Circuit, was filed by the American Petroleum Institute in 1994, challenging EPA’s rule on reformulated fuels. In this instance, the litigation seeks to restore the original consensus rule, which has been changed twice since it was first adopted.

- In response to President Clinton's September 1993 memorandum to heads of executive branch agencies, directing them to identify candidates for negotiated rulemaking and to undertake reg-negs in the next year, the Conference, in November 1993, presented (in cooperation with the Office of Management and Budget) a half-day seminar on how to get started.
- The Conference has worked closely with other federal agencies to make available several interagency training programs in negotiated rulemaking. These have included:
 - + Four-day training course for reg-neg facilitators, in conjunction with EPA and FMCS, March 1993
 - + Formal training, under an interagency agreement, for FCC staff, facilitator, and negotiating committee, July 1994
 - + Participation of Conference staff as expert faculty in developing and presenting courses offered by LEI, OPM, and GSA
- The Conference, under 5 U.S.C. §569(b), has established, and maintains, a roster of neutrals available for negotiated rulemaking, and has offered extensive advice and aid to agencies on locating and obtaining facilitators for reg-negs.
- Under an agreement with EPA, the Conference is currently undertaking a formal evaluation of EPA's experience with negotiated rulemaking. A report is expected late in 1995.

Publications

In 1990, the Conference published the *Negotiated Rulemaking Sourcebook*, a 900-page comprehensive guide and resource for agencies considering or conducting negotiated rulemaking. Because the volume is nearly out of print, the Conference has sought and obtained funding for a new printing of an updated version later in 1995.

To meet the demand of agencies and others for a briefer overview of how to do negotiated rulemaking, the Conference will publish a 32-page "How-to" guide in 1995.

The Conference's newsletter contains a column called "Reg-Neg Watch," a regular listing of current reg-neg activities.

Funds Authorized by the Negotiated Rulemaking Act for Negotiated Rulemaking

Section 4 of the Reg-Neg Act authorized appropriations of \$500,000 to the Conference for each of the fiscal years 1991, 1992, and 1993, to be used to carry out the purposes of the Act. In fact, no funds were actually appropriated in fiscal year 1991, and funds appropriated for this purpose amounted to only \$27,000 in fiscal year 1992 and \$14,000 in fiscal year 1993. Of these sums, approximately \$2000 was expended in 1992, under the provisions of 5 U.S.C. §569(f), to pay necessary expenses of participation for an environmental organization that participated in the Coast Guard's reg-neg on vessel response plans under the Oil Pollution Act of 1990. The remaining amounts were used to pay for Conference staff expenses in support of interagency negotiated rulemaking activities, such as training and distribution of publications that could not be provided under the Conference's regular appropriation.

Problems Identified

Specific problem areas that have come to light include the following:

Congress has chosen to mandate use of reg-neg by particular agencies in connection with certain programs, as specified in approximately a half dozen substantive statutes. Such provisions, because they have not been drafted consistently, have resulted in a proliferation of varying procedures. This situation requires research and consultation with agency legal staffs to determine what is required in each case.

Because the Reg-Neg Act was drafted so as to clarify the role of the Federal Advisory Committee Act (FACA) in reg-neg, the terms of the Act rely on FACA for the openness requirements that were of great importance to Congress. In the substantive statutes referred to in the previous paragraph, on several occasions Congress exempted the particular reg-neg proceedings from FACA. As a result, while the affected agencies have in fact carried out the reg-negs in the open, the conflicting legislative provisions act to eliminate the openness requirements.

Because negotiated rulemaking committees are explicitly covered by FACA, sponsoring agencies must comply with a variety of chartering and reporting requirements that may be superfluous in light of the determination of need made by the agency head under 5 U.S.C. §563 and the oversight and review functions of the Office of Management and Budget for rulemaking in general. It may be possible to achieve the openness goals of FACA and the Reg-Neg Act without requiring the paperwork and several levels of approvals required for advisory committees that are created for other purposes.

Negotiated rulemaking committees are created for a single purpose, which is to be achieved within a limited time period. The Reg-Neg Act, 5 U.S.C. §567, specifies that such committees terminate, at the latest, when the final rule under consideration is promulgated. Thus negotiated rulemaking committees do not contribute to the proliferation of long-lived advisory committees that have been the target of initiatives to reduce the number of advisory committees.

Some agencies that either have been required to do reg-negs, or have found reg-negs to be in the public interest, have raised questions about the applicability of unrelated statutory provisions (e.g., provisions affecting time limits for completion of rulemaking or provisions affecting composition of advisory committees) that may inhibit their ability to utilize the reg-neg process to its greatest benefit.

APPENDIX A: SUMMARY OF FEDERAL AGENCY NEGOTIATED RULEMAKINGS

The federal departments and agencies that have undertaken negotiated rulemaking are listed in alphabetical order. The negotiated rulemaking within the agency is identified according to the subject matter and is listed in chronological order of the use of the procedure. For those proceedings in which the negotiations have been concluded, the summary indicates whether the results were incorporated into the agency's proposed rule. Proceedings begun prior to passage of the Negotiated Rulemaking Act are marked *. Negotiated rulemaking undertaken pursuant to statutory requirements other than the Negotiated Rulemaking Act are marked #.

Department of Agriculture
Department of Education
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Labor
Department of Transportation
Environmental Protection Agency
Farm Credit Administration
Federal Communications Commission
Federal Trade Commission
Interstate Commerce Commission
Nuclear Regulatory Commission

Department of Agriculture - Animal and Plant Health Inspection Service

1. *Interstate Spread of Varroa Mites; (1988-89); Consensus proposed rule published by agency, but later withdrawn
2. *Control of Scrapie; (1990-92); Consensus proposed rule published

Department of Education

1. *#Financial Assistance to Meet Special Educational Needs of Children; (1988-89); Agreement on some issues; proposed rule published based in part on negotiations
2. *#Carl D. Perkins Vocational and Applied Technology Act; (1990-91); Agreement on some issues; proposed rule published based in part on negotiations
3. #Higher Education Amendments of 1992; (1992-93); Agreement on some issues; proposed rules published based in part on negotiations
4. #Direct Student Loans; (1993-94); Agreement on most issues; proposed rule published based in part on negotiations
5. #Guaranty Agency Reserves; (1993-94); Consensus proposed rule published
6. #Helping Disadvantaged Students Meet High Standards; (1995-__); Beginning

Department of Health and Human Services

1. Health Care Financing Administration -- Revision of Wage Index for Medicare Reimbursement for Hospice Services; (1994-__); Continuing
2. #Indian Health Service -- Indian Self-Determination; (1995); [Jointly with Interior -- Bureau of Indian Affairs]; Beginning

Department of Housing and Urban Development

1. #Performance Funding Criteria for Public Housing; (1994-__); Beginning

Department of the Interior

1. *Minerals Management Service -- Air Quality Regulations for the California Outer Continental Shelf; (1986-88); No consensus
2. Minerals Management Service -- Federal Gas Valuation; (1994-__); Continuing
3. *Bureau of Land Management -- Paleontology; Fossil Collection on Federal Lands; (1989-90); Negotiations concluded and agency action deferred
4. #Bureau of Indian Affairs -- Indian Self-Determination; (1995); [Jointly with Health and Human Services -- Indian Health Service]; Beginning

Department of Labor - Occupational Safety and Health Administration

1. *Occupational Exposure to Benzene; (1983-84); No consensus; proposed rule published based in part on negotiations
2. *Occupational Exposure to 4,4'-Methylenedianiline (MDA); (1986-87); Consensus proposed rule published
3. Safety Standards for Erection of Steel Structures; (1994-__); Continuing

Department of Transportation

1. *Federal Aviation Administration -- Flight Time Limitations and Rest Requirements for Flight Crewmembers in Air Transportation; (1983-84); Consensus proposed rule published
2. *Office of the Secretary -- Nondiscrimination on the Basis of Handicap in Air Travel; (1987-88); Consensus on many issues; proposed rule published based in part on negotiations
3. *Federal Highway Administration; National Highway Traffic Safety Administration -- Uniform System for Handicapped Parking; (1989-90); Consensus proposed rule published
4. Coast Guard -- Oil Spill Vessel Response Plans; (1992-93); Agreement on some issues; proposed rule published based in part on negotiations
5. Federal Railroad Administration -- Protection of Railroad Roadway Workers; (1994-__); Continuing

Environmental Protection Agency

1. *Nonconformance Penalties under §206(g) of the Clean Air Act; (1984-85); Consensus proposed rule published
2. *Emergency Pesticide Exemptions under Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act; (1984-85); Consensus proposed rule published
3. *Worker Protection Standards for Agricultural Pesticides; (1985-86); No agreement
4. *New Source Performance Standards for Woodburning Stoves; (1986); Consensus proposed rule published
5. *Resource Conservation and Recovery Act Permit Modifications; (1986-87); No consensus; proposed rule published based in part on negotiations
6. *Underground Injection of Hazardous Wastes; (1986-87); No consensus; proposed rule published based in part on negotiations
7. *Asbestos-Containing Materials in Schools; (1987); No consensus; proposed rule published based in part on negotiations
8. *Control of Volatile Organic Chemical Equipment Leaks; (1989-91); Consensus proposed rule published
9. Recycling of Lead Acid Batteries; (1990-91); Rulemaking proceeding suspended on basis of risk-benefit determination
10. Clean Fuels; (1991-92); Consensus proposed rule published
11. National Emission Standards for Coke Oven Batteries; (1992); Consensus proposed rule published
12. Hazardous Waste Manifests; (1992-94); Consensus reached by committee
13. Disinfectant Byproducts in Drinking Water; (1992-94); Proposed rules published, based in part on consensus
14. Architectural and Industrial Maintenance Coatings; (1992-__); Continuing
15. Wood Furniture Manufacturing; (1993-94); Consensus proposed rule published
16. Small Nonroad Engines; (199_-__); Continuing

Farm Credit Administration

1. Assessment and Apportionment of Administrative Expenses; (1992-93); Consensus proposed rule published

Federal Communications Commission

1. Provision of Non-voice, Low Earth Orbit Satellite Services; (1992); Consensus proposed rule published
2. Mobile Satellite Service in the Frequency Bands Above 1 Ghz; (1992-93); No consensus
3. Shared Use of the 28ghz Band for Satellite and Terrestrial Services; (1994); No consensus
4. Hearing Aid Compatible Telephones; (1995); Beginning

Federal Trade Commission

1. *Informal Dispute Settlement Procedures; (1986-87); No agreement

Interstate Commerce Commission

1. Electronic Tariff Filings; (1994); Negotiated rulemaking terminated following legislative changes

Nuclear Regulatory Commission

1. *Submission and Management of Records and Documents Related to the Licensing of a Geologic Waste Repository for the Disposal of High-Level Radioactive Waste; (1986-88); No consensus; proposed rule published based in part on negotiations
2. *#Indemnity Agreements with Radiopharmaceutical Licensees; (1988-89); Single issue negotiated without agreement

